

1 December 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Cancels & replaces the same document of 28 November 2017**

**Working Party No. 3 on Co-operation and Enforcement**

**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by  
Mexico (COFECE)**

**4-5 December 2017**

This document reproduces a written contribution from Mexico (COFECE) submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm](http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm)

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**JT03423966**

## *Mexico - COFECE*

### **1. Introduction**

1. The Federal Economic Competition Commission (Cofece) has the power to enforce measures to protect and/or restore competition in markets or to prevent the creation of anticompetitive market structures.
2. As stated in the Federal Economic Competition Law (FECL) Cofece can impose sanctions for infringements to this Law, order divestiture of assets, suspend acts constituting monopolistic practices or unlawful mergers, among other measures, in all areas of economic activity (except for telecoms), within Mexico. These remedies are imposed on economic agents, domestic or foreign, when their acts have or may have negative effects on competition in Mexican markets.
3. Furthermore, the Commission may impose remedies on mergers that pose anticompetitive concerns.

### **2. Territorial scope of remedies**

4. Globalization has led to companies and their decisions spill across national boundaries. The reach of the Mexican law regarding multinational corporations and foreign companies' anticompetitive practices or unlawful mergers is delimited by territorial principles. This means that Cofece can exercise its powers over businesses practices concerted outside the borders of Mexico, but only when the companies' actions harm competition and affect domestic markets.
5. For example, in 2016, Cofece issued 581.6 million Mexican pesos (approx. USD 31.4 million) fine against seven global shipping companies<sup>1</sup> after finding them responsible for allocating the market of maritime transportation of vehicles and heavy machinery and as a result lessening competition within Mexican territory.<sup>2</sup> The collusive agreements were implemented globally on international routes. What Cofece considered during its investigation was that these collusive agreements included Mexican ports, as point of origin or destination, to South America, Asia and Europe, and that the conduct had the effect of reducing competitive pressure and increased the costs of the services provided to companies in the automotive industry in the Mexican market.
6. To extend the scope of law enforcement and increase the effectiveness of its actions, Cofece works with other competition authorities in other jurisdictions through coordination and cooperation.
7. Specifically, Cofece cooperates with its international peers when: i) a cross-border merger or an international anticompetitive conduct has significant competition

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<sup>1</sup> Compañía Sud Americana de Vapores (CSAV), Kawasaki Kisen Kaisha (K-Line), K Line America; Mitsui OSK Lines (MOL), Mitsui OSK Bulk Shipping (MOBUSA), Nippon Yusen Kabushiki Kaisha (NYK) and Wallenius Wilhelmsen Logistics (WWL).

<sup>2</sup> File IO-005-2013. Final resolution available in Spanish at: <http://www.cofece.mx:8080/cfcre resoluciones/docs/Asuntos%20Juridicos/V222/0/3830118.pdf>

effects in Mexico; ii) it is possible that a decision taken by Cofece may affect other jurisdictions, or vice versa; and iii) when in complex cases, to compare approaches and issues of common-interest with authorities reviewing the same case.

8. Cooperation is carried out under several international instruments that incorporate provisions on competition policy. These instruments set the formal framework to cooperate with other jurisdictions and provide for comity, where the interests of other parties should be taken into consideration in international enforcement activities. These cases include Cofece's decisions regarding the initiation of an investigation, the scope of an investigation and the nature of the remedies or penalties sought in each case.

9. However, when deciding the optimal competition remedy, Cofece's Board of Commissioners mainly assess harm to domestic competition, and consider other agencies' decisions only if they coincide at the same issues or concerns.

10. For instance, the Commission reviewed the merger between Continental and Veyance,<sup>3</sup> which had effects throughout the NAFTA region and where the companies' assets were located in Mexico, the United States and Canada. Throughout the investigation, the respective competition agencies engaged in ongoing communication, discussed common-interest competition issues and shared information. Design of remedies was coordinated by the Mexican and the US competition authorities. The package of remedies imposed by COFECE (and the US authority) contemplated the divestiture of Veyance's air springs business in North America, including manufacturing and assembly facilities in the Mexican State of San Luis Potosi; and the R&D assets located in Fairlawn, Ohio. These measures satisfied competition concerns raised in Mexico and the US. Hence, international cooperation has been key when crafting extraterritorial remedies.

11. As may be seen, to better understand other jurisdictions concerns, align timing, consider potential extra-territorial conflicts and avoid inconsistent outcomes when imposing remedies, Cofece engages in regular communications with its counterparts, from the very early stages of an investigation. If confidentiality waivers have been granted by the parties, the Commission exchanges detailed information and evidence. Otherwise, investigation strategies, timing, public information, opinions, competitive effects, internal analysis of the case, best practices and precedents can be shared and discussed.

### 3. Designing remedies

12. When crafting remedies, it is particularly relevant to COFECE to be aware of those imposed in other jurisdictions. In some cases, remedy enforcement by other authorities can be considered by the Commission.

13. For example, to clear the merger between Dow Chemical Company and DuPont,<sup>4</sup> and in line with international best practices,<sup>5</sup> Cofece relied on the remedies negotiated and

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<sup>3</sup> File CNT-084-2014. Final resolution, available in Spanish at: <http://www.cofece.mx:8080/cfresoluciones/docs/Concentraciones/V591/88/1883446.pdf>

<sup>4</sup> File CNT-049-2016. Final resolution, available in Spanish at: <http://www.cofece.mx:8080/cfresoluciones/docs/Concentraciones/V5703/1/3959258.pdf>

accepted by the European Union and the United States competition agencies to lessen the negative impact of the transaction on the market for the commercialization of acid co-polymers and ionomers. COFECE agreed with the measures imposed by the US and EU agencies, which involved the divestment of the acid co-polymer and ionomer business to the Korean company SK Global Chemical, as it was considered that this remedy fully addressed any of the Mexican agency's competition concerns in this market. There are three reasons for this: i) the market for the commercialization of acid co-polymers and ionomers has a worldwide geographical scope, ii) the parties' productive assets were located outside of Mexican borders, and iii) the sales volume of acid co-polymers and ionomers in Mexico was low regarding the worldwide sales.<sup>6</sup>

14. In the case of cartel investigations, exchanging investigation strategies followed by other jurisdictions has been useful for Cofece to decide whether to start or close an investigation, to better evaluate harm in local markets and to determine sanctions

#### 4. Enforcing and monitoring remedies beyond national boundaries

15. As mentioned above, remedies may have an international scope. Imposing and monitoring remedies beyond the Mexican territory can be challenging, as the FECL (and other complementary laws) does not explicitly provide for extraterritorial enforcement of competition provisions. In addition, Cofece has limited experience in implementing these types of remedies, and application still poses concerns.

16. To address these obstacles, up to this moment, Cofece has relied on other competition authorities. For example, to ensure compliance with the remedy imposed on the merger between Dow Chemical Company and Dupont, in the final resolution, Cofece ordered the merging parties to provide all necessary documents to prove that the divestiture package committed with the US and EU authorities was fully observed.

17. In addition, alternative solutions have been set forth. For example, in the merger between Continental and Veyance, the Commission's Board of Commissioners subjected the approval of the transaction to a detailed divestiture plan, which contemplated the contract of an independent auditor to monitor compliance of the remedies. The independent auditor responsibilities involved supervising the assets divestiture, including those based in Ohio, United States. This measure allowed to verify parties' compliance, even when the remedies involved the monitoring of solutions outside the Mexican jurisdiction.

18. Monetary sanctions are another kind of allays to deter anticompetitive conducts. Where an infringement to the law has been ascertained, the Commission may impose fines against national or foreign individuals and organizations. However, Cofece faces a major challenge when enforcing fines against foreign economic agents as, up to date, there is no mechanism in force to implement these extraterritorial remedies, and the authority relies on the voluntarily payment of fines.

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<sup>5</sup> Merger Remedies Guide, 2016, ICN Merger Working Group, International Competition Network, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>

<sup>6</sup> Similar considerations were used by the Commission in the GE/Alstom case. File CNT-119-2014

19. The current regulatory framework establishes that it is the Mexican Tax Administration Service (SAT) the responsible authority to collect fines set by Cofece. Nevertheless, when COFECE imposes fines on multinational corporations with no subsidiaries in Mexico, these cannot be collected unless the SAT has a bilateral agreement with the tax collecting authority of the country to which the corporation belongs. To date, SAT has not signed collaboration agreements with its counterparts in other jurisdictions, hindering payment of fines.

20. These restrictions did not stop five of the seven international shipping companies that were sanctioned for collusive agreements in 2016, to voluntarily pay, in 2017, the fines imposed by the competition authority.

## 5. Final remarks

21. Besides conducting investigations and imposing administrative sanctions in accordance with the FECL, it is highly important for Cofece to consider other factors on a case by case basis when applying extraterritorial remedies such as the feasibility of executing them.

22. As previously mentioned, international cooperation with other competition authorities takes on added significance and importance in the light of recent trends in the expansion of international markets and companies growing beyond their national boundaries.

23. Therefore, to avoid conflicting outcomes with other competition authorities, and minimize extraterritorial negative effects when deciding the optimal competition remedy, it is essential to be aware of the effects of Cofece's decision in other jurisdictions and to consider approaches and analysis of other competition authorities.